Supreme Court, U.S.
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No. 97-1765

In The

Supreme Court of the United States

October Term, 1997

OGLEBAY NORTON COMPANY,

Petitioner,

vs.

LOIS E. JENSON, PATRICIA S. KOSMACH, KATHLEEN O'BRIEN ANDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the record shows that the District Court unfairly considered and disallowed foundation testimony for expert opinions, and erred in assessing the reliability of expert testimony, may the reviewing Court reverse the trial court's exclusion of expert opinions under an abuse of discretion standard?

LIST OF PARTIES

Petitioner's list of parties should be amended to add as Respondents Angel Alaspa, Shirley Burton, Audrey Daniels, Marilyn Greiner, Diane Hodge, Joan Hunholtz, Judy Jarvela, Mavie Maki, Michelle Mesich, Priscilla Robich, Debra Sersha, Marcia Steele, Marjorie Tolbert and Denise Vesel. These women are opt-in class members and were appellants below.

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STATEMENT OF THE CASE

The Petition for Certiorari singles out one issue among many interrelated issues which led the United States Court of Appeals for the Eighth Circuit to remand this case for a new trial on the damages available to the Respondents under the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2). Respondents are sixteen female Plaintiffs who successfully proved that Eveleth Mines[1] maintained a sexually hostile work environment as a "standard operating procedure," in violation of state and federal law. *See Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991) (Rosenbaum, J.) (class decision); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 888 (D. Minn. 1993) (Kyle, J.) (class liability decision). After the determination of class-wide liability — which was never appealed — the District Court appointed a Special Master to preside over a trial to determine individual damages under state law for class members.

At the damages trial, the Special Master made legal rulings, including rulings regarding Plaintiffs' expert psychological testimony, that obstructed the Plaintiffs' ability both to lay foundation for expert proof and to prove the nature and cause of their injuries. The District Court adopted the report and recommendations of the Special Master over Plaintiffs' objections. The Plaintiffs appealed to the Eighth Circuit on issues related to damages on their state law claims. The Petitioner did not appeal any issues.

The Eighth Circuit reversed the District Court, and remanded for a re-trial on damages, on two general grounds, both of which affected the damages awards to all Plaintiffs.[2] First, the Court of

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1. Eveleth Mines was owned and operated by Petitioner Oglebay Norton Company at all times relevant to this action.

2. The other bases for reversal focused on claims raised by particular Plaintiffs.

Appeals ruled that the Special Master and District Court had failed to follow state law by misapplying principles of causation, and by improperly allocating the burden of apportioning damages to the Plaintiffs where the Defendant raised a defense of pre-existing condition. *See* App. at 9a-16a.

Second, the Eighth Circuit ruled that the trial court had abused its discretion by categorically excluding Plaintiffs' expert medical testimony about the causes of their emotional distress. It wrote:

> **Upon reading of the record, ineluctably we are led to conclude that the Special Master's exclusion of this testimony did not rest upon any recognized area of discretion. The record strongly suggests the Special Master foreclosed consideration of the evidence based on his own preconceived notions relating to psychiatric proof. The Special Master did not attempt to hide his hostility toward psychological evidence in sexual harassment claims, stating: "Experts . . . know no more than judges about what causes mental changes — which is to say they know almost nothing."**

App. at 21a. This ruling gave rise to the issue Petitioner presents.

As an example of the trial court's abuse of discretion, the Court of Appeals cited the trial court's insistence that — contrary to the record — all of the parties' experts agreed that there is no scientific method for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists. *See* App. at 20a. The Court of Appeals also criticized the District Court's double standard in excluding the testimony of Plaintiffs' experts while at the same time "generally accepting the opinions of the expert witnesses produced by the Defendant."

Id. at 20a-21a. Moreover, the Special Master's refusal to allow the Plaintiffs' experts to provide the foundation for their opinions reinforced the appellate court's conclusion that the trial court had abused its discretion. *Id.* at 16a-19a, n.11-13.

The Court of Appeals was fully aware that *Joiner v. General Elec. Co.*, 78 F.3d 524 (11th Cir. 1996), *rev'd*, __ U.S. __, 118 S. Ct. 512 (1997) was pending before the Supreme Court at the time it was considering this appeal. The Court decided not to await the outcome of *Joiner* because

> even under a restrictive "abuse of discretion" standard, we find that the Special Master erred as a matter of law in excluding expert testimony on causation. Therefore, resolution of the standard of review question in *Joiner* does not affect our decision in this case.

Id. at 21a, n.15.

This Court issued its opinion in *General Elec. Co. v. Joiner*, __ U.S. __, 118 S. Ct. 512 (1997) after the appellate panel's decision in this case and before Oglebay Norton filed its petition for rehearing and rehearing *en banc* to the Eighth Circuit. In its petition to the Eighth Circuit, the Petitioner raised all of the arguments raised here about the impact of the *Joiner* decision. The full Court of Appeals for the Eighth Circuit considered those arguments and declined to grant rehearing. The Petitioner then sought review from this Court.

REASONS FOR DENYING THE WRIT

Oglebay Norton's Petition for Writ of Certiorari should be denied because the Petitioner's complaint concerns the application of the proper legal standard to the facts. The Eighth Circuit

correctly ruled that the District Court's exclusion of the Plaintiffs' expert psychological testimony did not rest on a proper exercise of discretion, but rather upon the Special Master's "preconceived notions relating to psychiatric proof." App. 21a. The Special Master's errors deprived the Plaintiffs of the only evidence that could link the sexual harassment they experienced at Eveleth Mines to their emotional harm.

Moreover, the Eighth Circuit held the District Court's rulings on the Plaintiffs' expert testimony were made in the context of its misapplication of the burden of proof under state law — a ruling the Petitioner does not ask the Supreme Court to review. Upon remand, the District Court must review expert evidence *de novo* in light of the Eighth Circuit's rulings both on the burden of proof under state law and the application of Rule 702 to the proffered expert evidence. The shifting of the burden may well change not only the trial court's view of the expert evidence, but also the Petitioner's arguments concerning admissibility.[3]

Thus the issue stated by the Petitioner neither fairly reflects the rationale for the Court of Appeals' ruling, nor does it present an issue ripe for review.

I.

THE PETITION FOR CERTIORARI, WHICH MISSTATES THE COURT OF APPEALS' RATIONALE, DOES NOT PRESENT A COMPELLING REASON FOR SUPREME COURT REVIEW.

The Court of Appeals' decision that the Special Master abused his discretion is not a matter appropriate for Supreme Court review. A Petition for Certiorari is only granted for

3. When the Petitioner has the burden of apportioning damages, it may well argue that expert psychiatric evidence on that issue is competent.

compelling reasons and rarely when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Petitioner's attempts to characterize the Court of Appeals' decision as applying the wrong legal standards is contradicted by the standards and grounds for reversal articulated in the Appeals Court's opinion.

The Petitioner distorts the Court of Appeals' decision to characterize it as inconsistent with this Court's subsequent ruling in *General Electric Co. v. Joiner*, __ U.S. __, 118 S. Ct. 512 (1997). In *Joiner*, this Court reaffirmed that the abuse of discretion standard applies to a trial court's decision to admit or exclude expert testimony. The issue arose when the Eleventh Circuit Court of Appeals applied a more stringent standard of review to the trial judge's exclusion of expert testimony because the Eleventh Circuit interpreted the Federal Rules as displaying a preference for admitting expert testimony. *Joiner*, 78 F.3d at 529. This Court reversed, holding that an appellate court may not use a more stringent standard of review than abuse of discretion when examining decisions disallowing expert testimony. *Joiner*, 118 S. Ct. at 517.[4]

The Eighth Circuit in this case did not apply a more stringent standard of review than abuse of discretion in reviewing the Special Master's decision to exclude expert testimony. Instead, as is described in more detail below, the Court reviewed the record and found it replete with indications that the Special Master's exclusion of Plaintiffs' expert psychological testimony was not based on a legitimate exercise of discretion, but rather on "preconceived notions relating to psychiatric proof" and "hostility toward psychological evidence in sexual harassment claims." App.

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4. The Court also held that a more searching standard of review is not required when the exclusion of the expert evidence results in the granting of summary judgment against the Plaintiff. *Joiner*, 118 S. Ct. at 517.

at 21a. The Court of Appeals' ruling is thus completely consistent with *Joiner* and prior decisions of this Court.

The actual and unstated ground on which the Petitioner seeks review is its claim that the Appellate Court used the correct standard of review, but misapplied it to the facts. This does not support a grant of a petition for certiorari. Sup. Ct. R. 10.

II.

THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING PLAINTIFFS' EXPERT PSYCHOLOGICAL TESTIMONY.

An abuse of discretion standard does not mean that the reviewing court lacks the authority or obligation to correct clear errors of law and fact. The Eighth Circuit properly reversed the Special Master who ignored and excluded proffered evidence establishing the reliability and relevance of expert opinions, and then excluded those important and admissible opinions based on hostility to psychological evidence.

A. A District Court is Not Free to Close the Gate on Relevant and Reliable Expert Psychological Evidence.

As this Court recently reiterated, an abuse of discretion standard of review "does not mean appellate review is an empty exercise." *Koon v. United States*, 518 U.S. 81, 98 (1996). In particular, an error of law is not beyond appellate correction given that "a district court by definition abuses its discretion when it makes an error of law." *Id.* at 100. Here, the trial court abused its discretion by closing the gate on crucial psychological evidence because it misconstrued the *Daubert* legal standard, and then ignored and excluded critical foundation testimony. In *Daubert*

v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court disapproved the more restrictive "general acceptance" test for admission of scientific proof as inconsistent with Rule 702. It held that scientific evidence need only "rest [ ] on a reliable foundation and [be] relevant to the task at hand" in order to be admitted under Rule 702. *Id.* at 597. The requirements of reliability and relevance under *Daubert* go to the ultimate issue under Rule 702 which is whether the testimony will be "helpful" to or "will assist" the factfinder. *Id.*; *United States v. Johnson*, 28 F.3d 1487, 1496 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1263 (1995). The Eighth Circuit found that the trial court in this case failed to apply these basic requirements properly when it categorically excluded the expert psychological evidence presented by the Plaintiffs. App. at 24a.

The Special Master's categorical exclusion of expert psychological proof in this case is reminiscent of the evidentiary ruling disapproved in *Barefoot v. Estelle*, 463 U.S. 880 (1983). There, a death row defendant objected to the admissibility of psychiatric evaluations of his "future dangerousness" in capital sentencing proceedings, claiming such predictions were too unreliable. The Court said the defendant's suggestion was "like asking us to disinvent the wheel." *Id.* at 896. It declared that barring such testimony "would . . . call into question those other contexts in which predictions of future behavior are constantly made." *Id.* at 898. The Supreme Court declared, even before rejecting the more restrictive rule in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), that the

> rules of evidence . . . anticipate that a psychiatric evaluation will be received and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence . . . .

Id. at 898.

Indeed, this Court has repeatedly treated the testimony of psychiatric and psychological experts as reliable and sometimes constitutionally required in the criminal context. *See Medina v. California*, 505 U.S. 437, 465 (1992) (psychiatric expert testimony is to be given great weight even if psychiatric opinions are not infallible because psychiatrists are the best informed and most able to judge a defendant's competence to stand trial); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (in some circumstances, due process requires that the state provide psychiatric expert testimony for a defendant asserting insanity as a defense and in the sentencing phase); *Rhodes v. Chapman*, 452 U.S. 337, 363 (1981) (noting that a court must be open to the testimony of psychological experts, among others, in assessing a claim that prison conditions constitute cruel and unusual punishment). This treatment is at odds with the Special Master's blanket dismissal that experts "know no more than judges about what causes mental changes — which is to say they know almost nothing." App. at 21a (quoting the Special Master).

The Special Master abused his discretion by not treating the proffered expert testimony in the manner explained by the Supreme Court in *Barefoot v. Estelle*. If psychiatric predictions of "future dangerousness" are admissible, and expert testimony regarding insanity and mental competence is so trusted that it is sometimes required by due process, surely the Eighth Circuit was correct in its view of the Special Master's intemperate assessment of such evidence.

Moreover, the Special Master's exclusion of expert psychological testimony on the cause of mental harm is contrary to the overwhelming body of cases where courts have admitted such proof because it is very helpful to the trier of fact. Even before *Daubert*, opinions of mental health experts pertaining to causation and future duration of mental injury were typically received as helpful to the factfinder pursuant to Rule 702 under

the more restrictive "general acceptance" rule of *Frye*. In *Busby v. City of Orlando*, 931 F.2d 764, 782 (11th Cir. 1991), the court held that expert testimony on the "psychological impact" of discrimination was directly relevant to the issue of causation of mental harm and was wrongly excluded. The courts have recognized that "[s]uch expert opinion is the prime — indeed usually the only — way to prove medical causation." *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 164 n.4 (4th Cir. 1988). *See also Brady v. Gebbie*, 859 F.2d 1543, 1558 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989) (psychiatric testimony amply demonstrated nexus between denial of due process and emotional distress).[5]

The adoption in *Daubert* of a *less* restrictive rule of admissibility expanded the range of admissible evidence under *Frye*. It is therefore not surprising that courts have consistently continued to receive expert proof of mental damages since the *Daubert* decision. *See, e.g., Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1692 (1997) (emphasizing the probative value of expert testimony in proving the cause of plaintiff's emotional distress). Indeed, the trend among the courts is to hold that discrimination plaintiffs cannot prove emotional distress without expert psychological testimony linking emotional harm to discrimination. *See, e.g., Patterson v. P.H.P. Healthcare*, 90 F.3d 927, 939 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997) (holding that *Carey v. Piphus*, 435 U.S. 245, 255-56 (1978) requires corroborating testimony or medical or psychological evidence to support an emotional distress damage award).

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5. *See also Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987) (psychiatric testimony supported damage award for emotional distress); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 776 n.3, 782 (S.D. Ohio 1988) (expert psychiatric opinion that harassment caused plaintiff's emotional distress); *Spencer v. General Elec. Co.*, 688 F. Supp. 1072, 1075 n.7 (E.D. Va. 1988) (PTSD testimony admissible to prove damages).

The Court of Appeals correctly applied the *Daubert* standard in ruling that Plaintiffs' proffered proof of mental damages from well-qualified, highly-experienced psychological experts should have been admitted and assigned its appropriate weight. Its ruling that the categorical exclusion of such proof based on hostility to the fields of psychiatry and psychology was an abuse of discretion correctly applies the standards articulated by this Court.

B. The Special Master Excluded and Misinterpreted Expert Foundation Testimony.

In support of its finding that the Special Master had abused his discretion, the Appeals Court cited to numerous instances in the record where the Special Master had refused to allow the Plaintiffs' experts to testify regarding the bases for their opinions. For example, Dr. Carol Novak, a psychiatrist who had examined six of the Plaintiffs, was not allowed to testify:

- whether the Diagnostic Statistical Manual directs that it is to be used in conjunction with clinical judgment;
- why it is important to determine the cause of a mental disorder;
- whether there are different categories of causes that bring about mental disorders;
- whether as part of her diagnosis she must decide if a particular category of causes led to a mental disorder;
- what kind of behavior [such as sexual harassment] she looked for to diagnose Post Traumatic Stress Disorder (PTSD);

- whether she had any preconceived ideas regarding her findings on causation;

- whether the Plaintiffs' PTSD was chronic or acute;

- what symptoms of PTSD were experienced by a Plaintiff during the time she was working at the mines;

- whether the symptoms a Plaintiff was now experiencing could have been caused by a rape when the Plaintiff was 19 years old;

- what symptoms a Plaintiff displayed that were specifically related to sexual harassment;

- whether she had identified symptoms that were associated with traumatic events of sexual harassment that led to a diagnosis of anxiety disorder.

App. at 16a, n.11 (citations omitted). The Court of Appeals found that the Special Master excluded similar foundation evidence from every one of the Plaintiffs' expert psychological witnesses. *Id.* at 17a-18a, n.12 (Dr. Bell), 18a-19a, n.13 (Dr. Mayberg). In this fashion, the Special Master bolstered his idiosyncratic view of the unreliability of expert psychological testimony by refusing to allow Plaintiffs' experts to explain the bases for their opinions regarding the cause of Plaintiffs' mental harm and prognosis.

The Eighth Circuit also rejected the Special Master's rationalization that highly relevant and reliable expert testimony should be excluded because of supposed "admissions" attributed to Plaintiffs' experts that psychiatric proof on the cause of mental disorders is inherently incompetent. The record does not contain

any such "admissions."[6] The Eighth Circuit also found "difficult to explain" the Special Master's general acceptance of expert psychological evidence proffered by the Defendants, despite the skepticism with which he treated the same type of evidence when proffered by the Plaintiffs. App. at 20a-21a. The appellate court's opinion that the Special Master abused his discretion by excluding and misinterpreting evidence was well supported.

C. The Petitioner Repeats the Special Master's Distortion of the Record Evidence.

In its Petition, Oglebay Norton repeats assertions from the Special Master's report which were unsupported in the record below. Contrary to statements in the Petition, the Plaintiffs' experts relied on informed, clinical judgment, not simply personal judgment, and did conduct differential diagnoses. *See* Petition at 4 and 5. A fair examination of the testimony of the claimants' experts shows that they all described their methodology for determining causation. *E.g.* A. 2254 (Dr. Novak looks at type of stressor, timing, symptoms' relationship to number of stressors, observation in medical exam when describing stressor); A. 2387-88 (Dr. Bell examines the timing of the stressor and symptoms, self report of the patient, duration, frequency and intensity of the stressor); A. 2098-99 (Dr. Mayberg focuses on the Axis IV diagnosis of stressors in the DSM and applies his clinical experience and professional judgment).[7]

The Plaintiffs' experts testified that they reached sound opinions regarding the cause of the Plaintiffs' mental harm through:

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6. To support his assertion that the Plaintiffs' experts admitted that there was no scientific method for determining the cause of a mental disorder, the Special Master cited *e.g.*, Trans. Vol. XXIII pp. 227-230, 239-241; Vol. XXII, pp. 69-72, 75. These pages of the transcript do not support that proposition.

7. Citations are to the Appendix filed with the Eighth Circuit.

(1) using the framework provided by the DSM; (2) conducting mental status examinations; (3) securing other pertinent information in the psychiatric interview; and (4) applying their specialized knowledge derived from professional experience to evaluate the effect of offensive conditions at Eveleth Mines in light of other stressors in the Plaintiffs' lives. Opinions arrived at in this fashion are the grist of forensic psychiatry. To exclude or discount them as representing mere "personal judgments" distorts the record.

Equally unsupported is the claim that the Plaintiffs' experts did not perform differential diagnoses. For example, Dr. Novak testified she analyzed information she obtained from a psychiatric interview, medical and psychological records, and other collateral sources, against the generally accepted and validated multi-axial diagnostic criteria set forth in the Diagnostic and Statistical Manual, III-R and IV Editions (DSM-III-R and DSM-IV). A. 2214-18. For each appellant she examined, Dr. Novak conducted a differential diagnosis, formulating as many potential diagnoses as possible, then ruling out some of them by applying the DSM-IV criteria, using clinical judgment and referring to psychiatric literature. A. 2218-23, 2230-32, 2238; A. 2253-54, 2256. Each one of the Plaintiffs' experts provided similar foundation for his or her opinion that was similarly ignored by the Special Master and the Petitioner.

III.

THERE IS NO BASIS FOR REVERSAL OR REMAND IN LIGHT OF *JOINER.*

The Petitioner fully briefed its argument concerning the application of *Joiner* in its petition for rehearing and rehearing *en banc*. The full Eighth Circuit considered whether *Joiner* would

alter the panel's decision, and rejected the petition for rehearing. Thus not only did the Eighth Circuit panel initially apply the abuse of discretion standard consistent with *Joiner*, but the entire Eighth Circuit has assessed the impact of the *Joiner* decision itself. Both prospectively and retrospectively, the Court of Appeals correctly applied the abuse of discretion standard in this case in a manner wholly compatible with *Joiner*. Thus, there is no basis for summarily reversing or remanding in light of *Joiner*.

Moreover, the Petitioner's request for summary reversal completely ignores the other grounds that led the Eighth Circuit to reverse the trial court. In particular, the Appeals Court held that the trial court had misapplied the burden of proving apportionment of emotional distress damage under state law. App. at 10a-14a. This ruling could well change the parties' positions on reliability of expert proof on remand to the trial court. Thus reversal is inappropriate for the additional reason that it would be both fruitless and premature.

CONCLUSION

The Petitioner has offered no basis for the Court to review the Court of Appeals' proper application of legal standards in this case. The Petition should be denied.

Respectfully submitted,

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